

**ML2 Handout - 1<sup>st</sup> Amendment**  
**[Slide numbers in square brackets]**

**1) [2] Introduction to the 1<sup>st</sup> Amendment**

- a. Text: “Congress shall make **no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the **freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances”
- b. **Meaning:** Guarantees the right to free expression, freedom of the press  
freedom of religion

**2) [3] Policy Arguments**

- a. Why do we protect free speech? \_\_\_\_\_  
\_\_\_\_\_
- b. How is the 1<sup>st</sup> Am. used in court? To attack an  
existing law as unconstitutional OR to defend it
- c. Are cases held in Federal or State Court? Scrutiny
- d. There are three levels of \_\_\_\_\_ that the Court  
must apply one of when dealing with different types of speech:  
**rational basis review ( )**; **intermediate scrutiny**  
**( )**; **strict scrutiny ( )**
- e. **[4]** Whose interests are being balanced? \_\_\_\_\_  
\_\_\_\_\_
- f. Ex: A political protest calls for killing all Congressmen and  
Congresswomen. The law makes it illegal to engage in speech  
that threatens violence against others. If Plaintiffs challenge the  
law for being unconstitutional, the court will balance the  
government interest in Law and order  
versus the protestors interest in Free speech
- g. Outcome? Law is Constitutional as there is  
another purpose to the law other than suppressing speech (ex:  
safety)

### **3) [5] 1<sup>st</sup> Amendment and the Film Industry**

- a. *Mutual Film Corp. v. Industrial Commission of Ohio* (1915) – 1<sup>st</sup> amendment protection does not extend to motion pictures
- b. Hays Code – Studios self-censored - films could have no profanity, no nudity, no illegal drug activity, good guys had to win, no sympathy towards criminals, no criticism of the church
- c. *Winters v. New York* – SCOTUS rules in favor of free speech as law about crime magazines is overly **vague**
  - i. Publication is entitled to free speech as **literature**
- d. *Burstyn v. Wilson* – The “Miracle” decision that found that movies were a significant medium for ideas and protected under the 1st amendment

### **4) [6] Types of Speech**

- a. Protected: Artistic speech and political speech
- b. Somewhat protected: Commercial speech, indecent speech/obscenity
- c. Not Protected: Hate speech/defamatory speech

### **5) [7] Artistic Speech**

- a. **Artistic speech** includes books, movies, art, literature, music, digital content
  - i. Courts evaluate artistic speech using RBR
- b. Why should artistic speech be protected? If all artistic speech needs to be approved by government, creates too much Censorship on what can be created

### **6) [8] Political Speech and TPM Restrictions**

- a. Political speech is protected unless it is like led to violence
  - i. Courts evaluate political speech using SS; if likely to incite violence, courts evaluate using Strict scrutiny

- b. *Brandenburg* case – Political speech is likely to lead to  
lawless action

### **Time, Place and Manner (TPM) Restrictions**

- a. TPM Rule: Government can regulate How where and when  
the speech is given  
provided that these restrictions are Reasonable  
and content neutral
- b. However, the government cannot regulate the subject matter  
or view point  
**of the speech itself**
- c. Example of Content-Neutral: No protest between 11pm to 7 am

#### **i. Courts use RBR for content-neutral laws**

- d. Example of Content-Restrictive: no anti trump no anti Harris and no anti ice

#### **i. Courts use SS for content-restrictive laws**

### **7) [9] Commercial Speech**

- a. Commercial speech is protected so long as the speech is not  
False or Misleading
- i. Ex: Superman costume Halloween
- ii. Courts evaluate laws concerning commercial speech  
using intermediate **scrutiny**
- iii. False advertising is unprotected

### **Fighting Words – racial, ethnic or sexist insults**

- a. *Chaplinsky* case: Insulting or fighting words, once spoken, are  
**likely to** inflict injury or breaching the peace

### **8) [10] Indecent/Obscene Speech**

- a. FCC considers indecent expression to be **offensive, explicit or graphic material which can cause harm to minors**
- b. Indecency is morally offensive to a  
reasonable person
- i. Courts evaluate indecent/obscene speech using SS

- c. *George Carlin* “7 dirty words” stand-up routine played on radio; court finds that the government can regulate indecent speech on public airwaves

**b. Miller Three Factor Obscenity Test**

- (1) whether the average/reasonable person finds the work appeals to the prurient interest [whether society thinks the work is obscene]  
(2) whether the work depicts offensive/sexual conduct;  
(3) whether the work, taken as a whole, lacks serious artistic, literary, political, scientific value

**9) [11] Defamatory Speech/Hate Speech**

- a. Defamatory and hate speech are **unprotected** under the 1<sup>st</sup> am.  
b. Defamatory speech is a False statement / of and concerning a person / which is published to a third party / that causes harm to one's reputation

**10) [12] Levels of Scrutiny**

- a. Scrutiny is the method a court uses to evaluate a law
- b. Rational Basis Review (RBR): The law must be **rationaly related** to a legitimate government interest
- i. Ex: Artistic speech, content neutral speech, Law concerning protest
- ii. Under RBR, almost any policy reason to pass the law is constitutional
- c. Intermediate Scrutiny (IS): Must **substantially relate** to an important government objective
- i. Ex: Commercial speech, indecent/obscene speech
- ii. Under IS, some laws are deemed constitutional
- d. Strict Scrutiny (SS): Must be narrowly tailored to promote a Compelling state interest
- i. Ex: fighting words, hate speech/ defamatory speech
- ii. The government must have No or very few other alternatives, otherwise the law is **unconstitutional**

11) **[13] Vagueness and Overbreadth**

- a. Plaintiffs can challenge the law for being **vague** or **overbroad**.  
If a court agrees, the law can be Struck down
- b. **Vagueness** - If reasonable persons of average intelligence have to guess as to its meaning
- c. **Overbreadth** - If law attempts to restrict behavior that is both unprotected and protected under the first amendment
  - i. Ex: School dress code
- d. *LAX Case*: Board resolution prohibiting “any first amendment activity” at LAX was struck down and **unconstitutional**

Mock Trial 1 – Key Issues to Discuss

- MT1A: Political speech/likelihood of violence, TPM restrictions, level of scrutiny (RBR vs. SS), independent research on violent or non-violent political protests
- MT1B: Fighting words/likely to inflict injury, commercial speech, level of scrutiny (IS vs. SS), independent research on whether violent video games lead to violence in society
- MT1C: Obscenity/3-part *Miller* test, artistic speech, level of scrutiny (RBR vs. IS), overbreadth, independent research on comedians with controversial material